Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CAROL BRILEY,

Petitioner,

v.

NATIONAL ARCHIVES & RECORDS ADMINISTRATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Are a federal employee's due process and property rights in her job violated when administrative and appeal forums fail to adhere to the rules for resolving factual disputes, and fail to timely resolve the employee's exercise of her rights in these forums?

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OPINIONS BELOW

The opinion below is reported as 236 F.3d 1373 (Fed. Cir. 2001). This was an appeal from the Board's second opinion in this case which can be found at 83 M.S.P.R. 380 (1999) (June 29, 1999). This appeal by Petitioner was from an initial decision of Administrative Judge Puglia issued October 21, 1998 which resulted from a remand by the Board in 71 M.S.P.R. 211 (1996) (July 19, 1996) which had vacated the initial decision rendered by Judge Rima on October 6, 1995 upon appeal by the Agency.

STATEMENT OF JURISDICTION

The Federal Circuit Court of Appeals entered its decision on January 22, 2001. The Chief Justice subsequently extended the time within which to file the instant Petition for a Writ of Certiorari to and including May 22, 2001. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This Petition concerns Section 7703(c) of Title 5 which reads:

> (c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be —
>
> > (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

> (2) obtained without procedures required by law, rule, or regulation having been followed; or
>
> (3) unsupported by substantial evidence; except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

STATEMENT OF THE FACTS

This matter is before this Court on a claim made by Petitioner under the 1989 Whistleblower Protection Act. Petitioner sent a letter to the Office of Special Counsel (hereinafter referred to as OSC) on September 6, 1994 regarding alleged retaliation for whistleblowing. After the time period had run, Petitioner filed an Individual Right of Action (hereinafter referred to as an IRA) with the St. Louis Regional Office of the Merit Systems Protection Board (hereinafter referred to as the MSPB).

The matter was heard by Administrative Judge William Rima III (hereinafter referred to as AJ Rima) who issued his Initial Decision October 6, 1995 (hereinafter referred to as ID) finding that Petitioner's supervisors had retaliated against her for her whistleblowing and ordering that she be placed in a GS-12 position. The Agency appealed the ID and the Board reversed on jurisdictional grounds. *See* 71 M.S.P.R. 211 (1996). The Board also ordered that if Petitioner was able to show she was entitled to a GS-12 she should be placed

in that position as the Agency's failure to reclassify her position would constitute a "personnel action" for IRA purposes under 5 U.S.C. § 2302(a)(2)(A)(ii).

Upon remand the case was sent to the Central Region of the MSPB in Chicago as the St. Louis Regional office had closed. Petitioner in an effort to cure the defects raised by the Agency in its first appeal to the Board, filed a second complaint to the OSC in 1995, after the 1994 amendments to the Whistleblower Protection Act. When the case was remanded, she sought to proceed under the second OSC complaint by abandoning the claims set forth in her initial OSC complaint. A second Administrative Judge, Puglia (hereinafter referred to as AJ Puglia), heard Petitioner's IRA based upon her amended claims to the OSC filed December 1, 1995.

The matter was heard for a second time in February, March and May of 1997, two years after the initial hearing. AJ Puglia rendered her 158 page ID (hereinafter referred to as ID2) October 21, 1998, 17 months after the second hearing which was almost devoid of legal citation, and which totally failed to identify factual disputes and resolve them under appropriate case law. Although the first ID had resulted in a finding of whistleblowing and retaliation as well as an improper denial to Petitioner of a GS-12, ID2 found that Petitioner had not made most of the protected disclosures she claimed to have made; that alternatively the disclosures were not the type upon which she could make claim; that she had not established that she had been retaliated against for her whistleblowing; that adverse personnel actions had not been taken against her, and even if they had, that the Agency had shown by clear and convincing evidence that it would have taken the same action anyway. Petitioner filed

an appeal which was summarily dismissed by the Board June 29, 1999, with absolutely no discussion of the issues. *See* 83 M.S.P.R. 380.

A notice of appeal was timely filed with the United States Court of Appeals for the Federal Circuit. Oral argument was had in September 2000 after briefing by the parties. A decision was rendered January 22, 2001 in which the Board deferred totally to the factual findings of AJ Puglia despite extensive briefing on the glaring inconsistencies in her findings and AJ Puglia's ignoring basic rules of resolving factual disputes. This total deference to the lower forum's fatally flawed factual findings adversely colored the remaining opinion of the Federal Circuit. Although the Federal Circuit found that the AJ had applied incorrect standards for disallowing most of Petitioner's claimed whistleblowing acts, and had also incorrectly found she had failed to administratively exhaust her remedies, it then relied on the flawed factual findings of the AJ resulting in a denial of Petitioner's claims despite Petitioner's detailed outline to the Federal Circuit, and the Board previously, of the countless factual inconsistencies and flawed analysis. In short, there was no analysis of the arbitrary and capricious manner in which the AJ had treated the factual disputes. The Federal Circuit closed its opinion with a rebuke to the Board for the time it took to process the instant case but made no comment on the impact that this had on the ultimate outcome.

Turning to the underlying facts of the case, Petitioner at the time of both hearings was a GS-11 journeyman archivist at the Truman Presidential Library in Independence, Missouri. She had started at the TL in the early 70's and had not risen above a GS-5 until she received a promotion to a GS-7/9/11 position as a result of an EEO settlement in 1986

with the TL and the then assistant Director, about whom she had complained. In approximately 1989 after numerous security issues with a GS-11 journeyman archivist performing classified work in the TL vault resulted in the "worst security violation in the history of NARA", Petitioner assumed the other archivist's duties for the declassification program. Thereafter, she was responsible for the daily vault operations with minimal supervision by the Supervisory Archivist, her supervisor, who admitted he had no experience of any kind handling classified documents.

Petitioner after being placed in charge of the TL vault made protected disclosures in two areas: first, with regard to the other archivist's continued work in classification; and second, problems with the physical vault holding the classified holdings of the TL. These disclosures were made both within the TL and outside the TL to NARA's Central Office in Washington, D.C. (hereinafter referred to as CO). Petitioner testified a National Security Council directive required she report **possible** security compromises to her supervisor. Petitioner's disclosures included her reporting how the other archivist talked too much about classified materials to the persons not properly cleared; about the violation of personnel standards under DCID by maintenance of his security clearance; that intelligence agencies were complaining they had been told his clearances had been dropped and he was to be fired but apparently the clearances were not dropped and he was still doing classified work; about his removing classified material from the vault to work on it in nonsecured areas in violation of rules prohibiting this conduct; how he misinformed the White House about a document; how he wrote the NSC to ignore rulings by the CIA on documents; how he improperly divulged classified information in card indexes for the public generating FOIA

requests to the CIA; how he improperly shared classified information with uncleared researchers; how he improperly shelved classified materials on "open non-classified" shelves which the FBI complained about; how CIA Intelligence officers complained about his continued access to, and handling of, classified documents; how he improperly opened classified materials in violation of CIA rules; and, how he improperly wrapped and tagged classified documents that were being sent to agencies for declassification. Unrebutted testimony by Petitioner in both hearings was that these were not *de minimus* violations of rules, but substantial violations which remained unresolved for the handling of classified documents and their declassification.

Petitioner also disclosed to her TL supervisor and the Assistant Director at TL and CO her concerns about uncleared guards doing repair work on the vault; issues about the vault doors; the alarm system; the codes being utilized; inadequate locks; lack of motion detectors and magnetic control devices; tour groups going by the open vault when classified documents were in the open; uncleared guards having control of the keypad giving access to the vault, uncleared contractors doing work above and around the vault, — all of which violated requirements imposed by the "intelligence community" for holding the documents at the TL. These complaints were voiced repeatedly from 1990 through the fall of 1993.

TL and CO management confirmed they had knowledge of these disclosures. The TL Assistant Director testified Petitioner had brought to his attention problems with the vault and people having access to it who should not and that Petitioner frequently reported problems with the declassification program regarding items of security with the

vault, vault alarms, through 1993. The TL Assistant Director admitted Petitioner had made disclosures to him about the other archivist. Petitioner's supervisor admitted that Petitioner had brought issues to his attention regarding the vault alarms and that he and Petitioner talked about the other archivist numerous times after 1989.

The Deputy Assistant Archivist for Presidential Libraries was involved in various personnel activities, personnel studies, reviewing personnel actions requests and processing them on through NARA personnel. He testified he was aware Petitioner had made complaints about the alarm vaults in 1993. Finally, the Information Security Manager for NARA testified that in the fall of 1993 Petitioner brought to her attention the continuing vault problems and her concern that TL may loose its certification if the problems were not corrected. The Information Security Manager for NARA testified that when Petitioner would bring these complaints to her attention she would relay them to the Director of the TL, TL Assistant Director and Petitioner's supervisor. The Information Security Manager for NARA contends these individuals would know the complaints came from Petitioner because it was Petitioner who was doing the majority of the work in the vault. The Information Security Manager for NARA testified Petitioner brought her concerns about the other archivist mishandling classified documents and that Petitioner told her she had brought her concerns about the other archivist to her supervisor. The Information Security Manager for NARA testified that The Deputy Assistant Archivist for Presidential Libraries told her that Petitioner had notified PL of "serious security violations."

In light of this evidence, ID2's findings that Petitioner's disclosures were "trivial" is unsupported by substantial

evidence. No one from PL or the TL ever disputed at any hearing that the intelligence community was complaining about multiple security issues at TL. The Information Security Manager for NARA testified that TL held very high level national security documents. No one ever told Petitioner she was making "a mountain out of a molehill" in regard to reporting these violations. Petitioner also testified that when she brought issues to her supervisor and the Assistant Director's attention they did not tell her she was overreacting, but confirmed to her they knew there were problems. Petitioner was told by the CIA that the problems involving the other archivist were serious: they complained about pages being missing from work done by the other archivist. The CIA also asked Petitioner to identify the other archivist when a CIA team came to look at documents. The CIA asked Petitioner at that time why the other archivist had not been fired for his violations.

The Information Security Manager for NARA testified that "intelligence agencies were very serious in their request to have the other archivist not handle classified documents." She went on to testify that Petitioner could not ignore vault problems and could not "pick and choose" which regulations to follow. According to the Information Security Manager for NARA, Petitioner made reports of purported security violations as she was required to do and used good judgment in doing so. Additionally, although ID2 infers that somehow Petitioner had discretion in reporting violations and abused that discretion, the rules regarding security were not discretionary with the TL according to the Information Security Manager for NARA which testimony was unrebutted by anyone else in the Agency. Finally, during the 1995 hearing of this matter, nearly one year after Petitioner's removal from her duties in the vault, the vault

was inspected by the Information Security Manager for NARA. TL was told if they did not correct some of the items Petitioner had been raising, TL would loose its vault certification. If the vault certification was lost, TL could not hold classified documents and they would be removed from TL. Despite this undisputed evidence ID2 found that only two of Petitioner's disclosures in 1990 were "reasonable" is unsupported by substantial evidence. This alone should have alerted the Board and the Federal Circuit to the arbitrary and capricious nature of the second AJ's rulings

The remainder of the Federal Circuit's opinion relies on factual findings by the AJ in ID2 that not only contradicted the factual findings in the original ID but which were fatally flawed by failing to resolve factual discrepancies as required by the Federal Circuit in Administrative forums for federal employees. This disregard for resolving the factual discrepancies and the ultimate decision between ID and ID2 resulted in a denial of due process for Petitioner and her property interest in her employment with the government. Despite findings by the AJ and the Federal Circuit that there was substantial evidence to support the ultimate findings of ID2, the fact of the matter is that the entire analysis of this portion of the case ignored the glaring factual disputes that the AJ consistently resolved in the Agency's favor even where no evidence for a factual conclusion or all the evidence pointed in Petitioner's favor.

Two key issues were the removal of Petitioner's duties and what she did thereafter; and her ability to obtain a GS-12 for the work she had been doing prior to March 1994. The Deputy Assistant Archivist for Presidential Libraries testified the 1990 Core Staffing Study done by CO provided for a nonsupervisory GS-12 **at the TL** as a "bridge" position

between a GS-11 Journeyman archivist and GS-13 Supervisory Archivist position, the purpose being to provide training for GS-11's on their way to supervisory positions so they would be ready when the GS-13 supervisory position became available. According to the Deputy Assistant Archivist for Presidential Libraries the difference between a GS-11 and a GS-12 non supervisory archivist was "depth of knowledge of the subject matter and senior experience". The Deputy Assistant Archivist for Presidential Libraries discussed with Petitioner's supervisor and the TL Assistant Director Petitioner's 12 request sometime in December of 1993. He told them "he had no problem with Petitioner being given the 12". The Assistant Director testified that when he talked with The Deputy Assistant Archivist for Presidential Libraries after his initial conversation with Petitioner, he mentioned to him removing some of her duties; the Deputy Assistant Archivist for Presidential Libraries response was allegedly that it might be considered "reprisal" for coming to him for the GS-12. The Deputy Assistant Archivist for Presidential Libraries admits there was a discussion of "reprisal" in his conversation with Assistant Director in December, but does not recall what the discussion was in reference to at that point in time or even who brought it up.

A PL classification specialist, confirmed the distinction between a GS-11 Journeyman archivist and a GS-12 non-supervisory archivist and stated the position was established "to assist the archivist-in-chief in running the staff and to establish career opportunity". The position description was generalized to allow for flexibility in the position. The PL classification specialist, **like the Deputy Assistant Archivist for Presidential Libraries, testified that what sustained a GS-12 non supervisory position was senior level archivist knowledge and work**. The PL Classification

Specialist stated after the Core Staffing Report was issued "most if not all" of the PLs opted to get a GS-12 approved. Other factors considered for a GS-12 would be whether Petitioner worked independent of her supervisor or if the declassification work was going to increase as her supervisor believed, and informed the Deputy Assistant Archivist for Presidential Libraries, after the Executive Order on declassification was signed by President Clinton. **None of this was provided the PL Classification Specialist although he suggested it be provided him so that he could evaluate Petitioner's job.** The Assistant Director admitted the PL Classification Specialist asked him whether he wanted a desk audit on Petitioner but that TL did not follow up on the request.

Petitioner was extremely knowledgeable in her field. According to Petitioner's supervisor, prior to March of 1994 he had never handled the documents in the vault; nor had he done mandatory review work and only knew what Petitioner told him. The other archivist stated only Petitioner had the expertise to do declassification work as of March of 1994, and that others, including himself, would need additional training. The Assistant Director testified Petitioner was the only "certified archivist" at TL, and that Petitioner had done the best job of anyone in the job of declassification at TL.

Although ID2 found a GS-12 was not available at TL, this was clearly not the case given the above testimony. Although the Agency contends Petitioner was not doing the work of GS-12, questionnaires were submitted to the personnel at other PLs who Petitioner contended were doing her job and who had GS-12s or higher graded positions. The questions submitted to these individuals by Petitioner asked whether the duties which Petitioner contended she was

performing at the time the Agency removed her from her job duties in March of 1994 as stipulated to by the Agency during the first hearing, were being performed at the GS-12 or higher grades in other PI's. The responses demonstrate Petitioner had as many —if not more — duties than most of her counterparts at other libraries prior to the removal of these duties in March of 1994 and that the duties she was performing in March of 1994 were those that her counterparts were performing as a GS-12 **or higher grade level.** Petitioner testified that after she took over the declassification program from the other archivist in 1989 she had no daily or weekly supervision from her supervisor; no one reviewed her work and no one passed judgment on her decisions; she prepared the reports and when necessary had her supervisor sign. Her supervisor never changed anything on the reports. Petitioner wrote the first declassification manual for the TL. However, the Federal Circuit felt this evidence was not relevant and only supported that all the GS-12's should be reclassified as 11's. Clearly this did not happen.

The AJ and the Federal Circuit also found that Petitioner did duties consistent with her position of a GS-11 after the removal of her duties. However, this is not borne out by substantial evidence in the record. First of all, AJ Rima had found that Petitioner's job duties had in fact been taken away as stipulated to by the Agency. He found Petitioner had been relegated to low level duties. AJ Puglia disagreed finding there was no stipulation. However, AJ Puglia never sought to explain why her decision was diametrically opposed to that of AJ Rima. Petitioner testified that on March 28, 1994 her supervisor called her to his office and informed her she would no longer be doing declassification work and there would be no promotion. When Petitioner asked what she would be doing he stated "he didn't know, because he hadn't

thought about it." Petitioner testified that after she was removed from her duties she called a friend at CO. According to this friend, the TL Assistant Director had not asked for a GS-12 for Petitioner but had called CO and referred to her as a "troublemaker" and that he wanted to get her out of the vault and rid of her. This friend also told Petitioner that the Deputy Assistant Archivist for Presidential Libraries came to her and said "you're a friend of Petitioner, but you should know she is a troublemaker." These statements were unrebutted by the Agency at hearing yet AJ Puglia found that Petitioner did retain duties consistent with her Grade level and was not the subject of retaliation. For example, AJ Puglia found she retained declassification duties but Petitioner testified that she was never allowed to do that work. These factual discrepancies are glaring throughout this analysis of Petitioner's work post March 1994 yet the AJ and the Federal Circuit ignored the evidence.

After Petitioner's removal from her duties, she had nothing to do and was sitting around at different desks in the building reading books. According to Petitioner, her supervisor told her he would send her yellow slips with work on it. In May or June 1994 her supervisor announced that a GS-5 secretary at the TL had retired and he gave Petitioner some of her duties including typing labels, putting documents in folders, writing cross indexes. This was not denied by the Agency at any time. After March 1994 Petitioner's job duties were not described to her. Petitioner testified that prior to March of 1994 she was answering letters on foreign policy matters but that after March of 1994 she would be answering letters from children requesting pictures of Truman or for information on class history papers, tasks the GS-5 had been doing. She had about an hour of work a month to fill her time. None of this testimony is rebutted by the Agency.

ID2 states Petitioner's duties were not taken away or were in fact shared duties, despite a stipulation signed by the Agency detailing the taking away of Petitioner's duties, and a "restructuring memo dated March 24, 1994. AJ Rima who participated in the drafting of that stipulation found that the Agency stipulated to the taking away of the duties. The stipulation admitted Petitioner performed in excess of 100 discreet tasks independently without direct supervision as part of her job prior to March 24, 1994 and that after March 24, 1994 she was not only removed from those duties, but relegated to clerical tasks of a GS-5 which were discreetly assigned by her supervisor. Again, unrebutted by the Agency. **Petitioner contends that after March 24, 1994 she performed jobs at an Archival Technician level or below, and did nothing at the level she had been doing prior to March 24, 1994.** Petitioner's title of Alternate Top Secret Control Officer and Alternative Assistant Information Security Officer was removed in March of 1994. That Petitioner's duties were removed is further substantiated by the Agency's refusal to reinstate them in August of 1994 after a grievance was filed by Petitioner.

However, the most fatally flawed analysis by AJ Puglia, which was affirmed by the Federal Circuit, was the review of the "clear and convincing evidence" that AJ Puglia claimed supported that TL would have removed Petitioner from her job and not promoted her to a GS-12 even absent her whistleblowing. The two basis upon which the ID2 rests for this conclusion are that the Agency would have restructured its declassification program anyway; and second, that Petitioner was not doing classification work equivalent to other positions in other libraries. The problem with this conclusion is that the **only** stated reason given by Assistant Director, **the person who made the decision to remove**

Petitioner from her duties and not promote her, was that Petitioner was "sick" and that he and Petitioner's supervisor were concerned about Petitioner's health and the stress of her job on her. The Assistant Director said this was his primary concern for removing the duties and not promoting Petitioner. Only because the Agency's representative made the argument about "reorganization" during hearing before AJ Puglia did this evidence even come before AJ Puglia. That the ID2 ignores the primary reason given by the manager who made the decision to remove Petitioner and not promote her itself should demonstrate the lack of substantial basis for finding that the Agency proved by "clear and convincing evidence" that it would have removed Petitioner's duties and not promoted her.

As for Petitioner not showing she was doing the duties of a GS-12, the Agency never had a desk audit performed before her duties were removed to determine whether her duties, were the same as those at other libraries who had been graded the position a GS-12 or higher. The one person who had access to all the persons doing declassification work at all the libraries as well as "vault duties" was The Information Security Manager for NARA. The Information Security Manager for NARA unequivocally stated that Petitioner was doing the same work. The Information Security Manager for NARA testified that based upon her experience since 1990 in PL as head of security, each PL designated **one** archivist as the source person who had the knowledge, background and history of the documents to do declassification work. She assumed **all** these persons had the same grade level. Nor can it be disputed that persons holding the titles that Petitioner did, were at a higher graded position, in most instances a GS-13 supervisor, like Petitioner's supervisor, or even a GS-14. This the ID2 ignores and rather relies on (as does the Federal Circuit) excerpted testimony from a PL Classification Specialist taken out of context.

PL Classification Specialist acknowledged he did not have all the information necessary to make the decision because Assistant Director had never provided the requested information to him.

There were severe credibility issues during the Agency's evidence as well, especially during Petitioner's supervisor's testimony[1]. There was no credible evidence to support Petitioner was sick, perceived herself as sick, or that others (outside of the Assistant Director and her supervisor) perceived her as sick. However, this statement by the Assistant Director must be taken in light of the Assistant Director' prior effort in 1986 to cast Petitioner in an "emotionally unstable" light when she was in the process of being promoted after her EEO action against him.

Petitioner testified she had taken no sick leave prior to her meeting with the Assistant Director in December of 1993. The Assistant Director and her supervisor made no inquiry of Petitioner after Petitioner's telephone conversation with

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1. Perhaps the most incredulous testimony affecting the credibility of Assistant Director and Petitioner's supervisor came during the second hearing when Petitioner's supervisor testified that he believed Petitioner had "set him up" and tried to destroy him by setting up an unannounced inspection in 1995 and had in fact destroyed classified documents to do so. On cross examination by Petitioner's representative, the supervisor admitted he had no facts, statements, documents or even rumors to support this statement made in an open courtroom with someone from the public unassociated with the case present.

When the Agency's representative attempted to get the Assistant Director to confirm this bizarre statement of Petitioner's supervisor, the Assistant Director either could not or would not go along with the supervisor's slanderous statements towards Petitioner.

the Assistant Director in December about her health. Petitioner also testified that neither the Assistant Director nor her supervisor ever made any inquiry regarding her health during the remainder of 1994. Likewise, when her duties were temporarily returned to her in May of 1995, no one ever asked Petitioner whether it would be stressful for her or how her health was at that point in time. There is no evidence whatsoever that a "fitness for duty exam" was requested by the Assistant Director or her supervisor, which given Petitioner's security clearance, could have been requested. In May 1994 Petitioner filed a grievance because of her removal from her prior duties and the Assistant Director became aware that she did not wish to be removed from her duties. At the grievance meeting, Petitioner informed the Assistant Director and the others present she was doing "nothing". Apparently, this did not concern TL management as no one assigned Petitioner any work.

Likewise there was absolutely no "clear and convincing evidence" of a so called " reorganization plan" by Petitioner's supervisor as claimed by AJ Puglia and as set forth in ID2. Although the "team approach" to management of "vault" documents was a recognized and utilized concept in the PL system, all the PLs had utilized a GS-12 in some capacity to "head up" the team — there was no evidence that any library had in fact used a GS-13 Supervisory Archivist to head up a "team" as Petitioner's supervisor now intended to do. It can also be argued, that if the Assistant Director was intent on pursuing a GS-12 non supervisory archivist position for Petitioner, and relieving her workload and attendant stress, the "plan" to utilize a "team" would have also included the concept of a "team leader" with Petitioner in that position, backed up by others who could learn from Petitioner. Yet that was not done. Nor was any legitimate attempt made

by the Agency to explain why it was not done or even considered. Rather, the new "team" consisted initially of the other archivist (who was not to work in classified) and another archivist who had no classification experience at all and Petitioner's supervisor, who by his own admission and that of the Assistant Director, had next to no experience at all in the vault and knew only what Petitioner had told him. Petitioner's supervisor admitted that rather than have Petitioner train the new team in the work of the vault, they sat together and read "manuals" including those prepared by Petitioner, without any input from her even though she was the "expert". In fact, Petitioner's supervisor could not recall at the hearing anything he had said to Petitioner about training anyone at all.

This "reorganization" led to an inspection of the TL vault by the Information Security Manager for NARA in May 1995 and her "writing up" TL for numerous security violations. As a result of those criticisms, the Assistant Director had discussions with CO in which he was told to remove Petitioner's supervisor from his position as head of "vault team" and reinstate Petitioner. Petitioner's supervisor also requested that the titles he held as Top Secret Security Control Officer and Assistant Information Security Manager and the responsibilities attendant to those titles be given to Petitioner immediately. Of course Petitioner was not given a GS-12 and the "reorganization" was never enacted thereafter. This record clearly indicates that there was a total lack of "clear and convincing evidence" to support ID2's finding that TL would have removed Petitioner anyway from her job and not promoted her.

REASON FOR GRANTING THE WRIT

ARE A FEDERAL EMPLOYEE'S DUE PROCESS AND PROPERTY RIGHTS IN HER JOB VIOLATED WHEN ADMINISTRATIVE AND APPEAL FORUMS FAIL TO ADHERE TO THE RULES FOR RESOLVING FACTUAL DISPUTES, AND FAIL TO TIMELY RESOLVE THE EMPLOYEE'S EXERCISE OF HER RIGHTS IN THESE FORUMS?

Decisions by an Administrative Judge and the Merit Systems Protection Board are to be reviewed by the Federal Circuit in accordance with the requirements of 5 U.S.C. § 7703(c) (1988) which provides that with regard to "factual findings and conclusions", the Court reviews the Board's decision to determine if there is substantive evidence in the record supporting the factual findings, and to ensure that, in light of that evidence, conclusions of fact and decisions emanating therefrom are not "arbitrary or capricious", an abuse of discretion, or otherwise not in accordance with law; or unsupported by substantial evidence. The Federal Circuit, however, reads this standard to mean that the Board's credibility (and factual) determinations are virtually unreviewable on appeal by presumably the Board as well as the Federal Circuit. *Briley v. National Archives & Records Administration*, 236 F.3d 1373, 1376 (2001). This Briley contends effectively results in a denial of due process when the Board and the Federal Circuit have, as in this case, totally ignored substantial evidence that contradicts the findings by the Administrative forum under the guise that this is best left for the initial trier of fact. Under this standard, as shown by the facts in this case, a federal employee is left to the capricious whims of an administrative judge who chooses, for whatever reason, to ignore large blocks of evidence.

The rules enunciated by the Board and the Federal Circuit in case law have set forth how an Administrative Judge is to resolve factual disputes and issues of credibility. In the case of the Whistleblower Protection Act, consideration of contradictory evidence in the record *is required* in determining whether substantial evidence supports factual findings, as to reasonable belief that employee is disclosing violation of law, rule or regulation that that violation of the WPA has occurred, since substantiality of evidence must take into account whatever in the record fairly detracts from its weight. *Frederick v. Department of Justice*, 73 F.3d 349 (Fed. Cir. 1996). The Board early on determined that the Agency in order to sustain its burden of "clear and convincing evidence" must show "that degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established". *Gergick v. GSA*, 43 M.S.P.R. 651, 662-63 (1990), 5 C.F.R. 1209.4(d). The "clear and convincing" standard **requires** an analysis of credibility, motivation, and bias of witnesses to events. In determining whether the Agency showed, by "clear and convincing evidence", that it would have taken the same personnel action in the absence of the appellant's whistleblowing, the Board has considered the following factors: The strength of the Agency's evidence in support of its personnel action; the existence and strength of any motive to retaliate on the part of the Agency officials who were involved in the decision, and any evidence that the Agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. *Scott v. Department of Justice*, 69 M.S.P.R. 211, 240, *aff'd*, 99 F.3d 1160 (Fed. Cir. 1996) (Table of Cases); *Caddell v. Department of Justice*, 66 M.S.P.R. 347, 351 (1995), *aff'd*, 96 F.3d 1367 (Fed. Cir. 1996); *Jones v. Department of the Interior*, 74 M.S.P.R. 666, 672-673 (1997); *Brewer v. Dept. of the Interior*, 76 M.S.P.R. 363, 370 (1997) citing to *Caddell, supra*.

To resolve credibility issues, an AJ **must** identify the factual questions in dispute, summarize the evidence on each disputed question, state which version he believes, and explain in detail why he found the chosen version more credible, considering such facts as: the witness' opportunity and capacity to observe the event or act in question; the witness' character; any prior inconsistent statement by the witness; a witness' bias, or lack of bias; the contradiction of the witness' version of events by other evidence or its consistency with other evidence; the inherent improbability of the witness' version of events; and the witness' demeanor. *Craft v. Dept. of Veterans Affairs*, 78 M.S.P.R. 374, 378 (1998). The Board, although it must give deference to the AJ's fact finding **where it is clear the AJ considered the evidence as a whole**, drew **appropriate** inferences and made **reasoned** conclusions on issues of credibility, may make its own determinations of fact when it articulates a sound reason, based on the record, for a contrary evaluation of the evidence. *Craft, Id. See also Rackers v. Department of Justice*, 79 M.S.P.R. 262 (1998).

Finally, the Board **requires** that the Initial Decision identify **all** material issues of fact **and law**, summarize the evidence, resolve issues of credibility, and include the AJ's **conclusions of law and his legal reasoning, as well as authorities on which that reasoning rests.** *Scott, supra* at 221.

Petitioner believes the record clearly demonstrates that the AJ did not engage in this analysis. That when the matter was appealed to the Board, the Board deferred to the AJ's factual findings thereby ignoring rules and regulations regarding factual analysis, and the Federal Circuit did likewise. The rules are clear and if enforced, due process to

preserve a federal employee's property interest in her job exists. However, when the Board and Federal Circuit pay lip service to the standards and the AJ ignores entirely basic standards of resolving factual disputes, not only are due process rights denied the federal employee but the entire legitimacy of the forum is brought into question.

Here too, as the Federal Circuit noted in closing its opinion, almost six years elapsed between the bringing of the complaint to the Office of Special Counsel and the resolution by the Federal Circuit. The second AJ took over two years to rehear the matter and reach a decision which in its 158 pages ignores large portions of the record and is almost devoid of legal citation. Petitioner recognizes that pursuit of rights sometimes is lengthy and protracted, but the great expanse of time engaged in by the second AJ in this case also supports Petitioner's belief that the analysis was flawed by the mere passage of time.

Petitioner quite frankly cannot afford including the 158 page opinion in this brief. Petitioner has therefore resorted to pointing out the factual discrepancies which should call into question whether legitimate standards were applied by the AJ and properly reviewed by the Board and Federal Circuit. Exercise by this Court of its supervisory authority is necessary here to reaffirm to the courts below that short shift should not be given to due process rights affecting the property interests of federal employees in their jobs. If federal employees are not to have a jury trial to resolve their disputes with their federal employer, they should be guaranteed a forum which fairly and by some standard required to be adhered to adjudicates the facts. Otherwise review by a higher court becomes merely a "rubber stamp" which affects the ultimate legal decision which is dependent upon a fair resolution of the facts.

CONCLUSION AND STATEMENT OF RELIEF SOUGHT

Petitioner respectfully requests this Court grant certiorari in this case on the question presented as an exercise of this Court's supervisory authority over lower courts to ensure that Petitioner's property interest in her federal employment is accorded due process of law. Petitioner further requests that this case be remanded for a new analysis of her factual claims consistent with the rules of the Board and the Federal Circuit.

Respectfully submitted,

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APPENDIX — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DATED AND DECIDED JANUARY 22, 2001

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

99-3413

CAROL BRILEY,

Petitioner,

v.

NATIONAL ARCHIVES & RECORDS ADMINISTRATION,

Respondent.

DECIDED: January 22, 2001

Before NEWMAN, LINN, and DYK, *Circuit Judges*.

DYK, *Circuit Judge*.

Petitioner Carol Briley is an Archivist, GS-11, at the National Archives and Records Administration's ("agency's") Harry S. Truman Library ("Library") in Independence, Missouri. She claims that the agency declined to upgrade her position and that her duties were improperly reduced in retaliation for engaging in protected whistleblowing activities. The Merit Systems Protection Board ("Board")

rejected Briley's claim, finding that Briley had failed to exhaust her administrative remedies, that the agency did not take or fail to take a "personnel action," and that in any event, the agency had shown by clear and convincing evidence that it would have taken the same actions regarding Briley even absent her protected whistleblowing activities. We hold that petitioner has exhausted her administrative remedies, that Briley's change in duties which resulted from the Library's restructuring did not constitute a personnel action, and that substantial evidence supports the Board's determination that the agency would not have reclassified Briley's position as a GS-12 or created and promoted her to a new GS-12 position even absent her protected whistleblowing activities. We therefore affirm.

I

The basic facts of this dispute are set forth in the 157 page opinion of the administrative judge, and the administrative judge's findings are summarized below.

Petitioner Briley began work at the Truman Library on March 28, 1974, in a GS-05 archival position. She was promoted to GS-07 archivist in 1976. As the result of the settlement of a 1986 Equal Employment Opportunity ("EEO") sexual harassment complaint against Dr. George Curtis, her supervisor, the agency promoted Briley to a GS-09/11 archivist position. One year after settling her sexual harassment complaint, the agency promoted her to GS-11.

Following the settlement, Briley began to take part in the declassification work of the Truman Library. In 1988,

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Dr. Raymond Geselbracht joined the Library as the supervisory archivist and became Briley's first-line supervisor. Dr. Curtis then became her second-line supervisor. Also by 1988, Briley had responsibility for day-to-day functioning of the Library's declassification program.

Briley alleges that beginning in May 1990 and continuing through May 1995, she made 42 separate disclosures protected under the Whistleblower Protection Act. *See* 5 U.S.C. § 2302(b)(8). The substance of these claimed disclosures apparently remained largely the same during this period. Half of the alleged disclosures concerned the access of another employee, Dennis Bilger, to classified documents and his compliance with applicable regulations. The parties agree that Briley made a protected disclosure on May 2, 1990, when she informed Dr. Geselbracht that Bilger had left collections containing classified information in open areas of the library. The rest of the alleged disclosures concerned security issues with the Library's vault. The parties agree that Briley made a protected disclosure when, on or before May 9, 1990, she reported to Dr. Geselbracht, Dr. Curtis, and others that contract security guards could disable the Library vault's alarm.

Briley alleges that her protected disclosures resulted in three adverse personnel actions. First, she alleges that in retaliation for her protected disclosures, the vast majority of her duties were taken from her on March 28, 1994, and that the agency subsequently failed to restore her original duties to her. Second, she alleges that the agency retaliated against her by failing to reclassify her position from GS-11 to GS-12. Third, she alleges that in retaliation for her protected

disclosures, the agency failed to create a new GS-12 Nonsupervisory Archivist position and promote her to it.

The agency's alleged personnel actions took place in the context of Briley's longstanding efforts to win promotion to GS-12. In 1988, not long after assuming Bilger's declassification responsibilities, Briley began talking to Dr. Geselbracht about a promotion to GS-12. Dr. Geselbracht encouraged Briley to seek a promotion by obtaining a GS-12 position at another Presidential Library large enough to warrant a GS-12 archivist with expertise in declassification, and he reminded her that the Truman Library's declassification program was old and small. Briley, however, wanted a promotion to GS-12 without leaving the Truman Library.

In 1993, Briley continued to seek a promotion to GS-12. She believed that she was performing GS-12 work and that her position should be reclassified as a GS-12 position. She continued to complain to Dr. Geselbracht about her GS-11 classification.

Briley arranged a meeting with Dr. Curtis for December 10, 1993. She told Dr. Curtis that she wanted to be a GS-12. Dr. Curtis told her that he would contact the Office of Presidential Libraries and seek a determination of whether or not her position needed reclassification. There is some dispute over the rest of what transpired at the meeting. Briley claims that Dr. Curtis told her that he supported her request for a promotion. In contrast, Dr. Curtis claims that he never promised Briley a promotion. He also asserts that Briley told him her job was so stressful that she did not want to continue declassification work unless she received a promotion to GS-12.

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After her meeting with Dr. Curtis, Briley also spoke with Dr. Geselbracht and told him that Dr. Curtis had promised her a promotion. Like Dr. Curtis, Dr. Geselbracht stated that Briley told him that she did not want to continue working on declassification unless she was promoted. Dr. Geselbracht interpreted this statement as an ultimatum, and he regretted not having an effective back-up for Briley. The administrative judge relied upon the testimony of Dr. Curtis and Dr. Geselbracht in finding that Briley had declined to continue declassification work unless she was promoted.

Dr. Geselbracht, who says he was concerned that the Library's declassification program was at risk, contacted the Assistant Director of the Eisenhower Library, who explained to Dr. Geselbracht that the Eisenhower Library used a team approach to declassification, with lower-graded Archives Technicians doing a substantial portion of the work. Dr. Geselbracht devised such a team approach for the Library. He submitted his plan on March 8, 1994, and Dr. Curtis approved the plan on March 14, 1994. According to Dr. Geselbracht, one purpose of the plan was to assign a portion of Briley's declassification work to Archive Technicians, freeing Briley for more substantial Archivist duties. He also hoped that the program would become less dependent on any one person. Furthermore, the plan would be more flexible: it could expand or contract to meet current needs of the declassification program.

On March 28, 1994, Dr. Geselbracht informed Briley and other staff members of the restructuring plan. In his meeting with Briley, Dr. Geselbracht told her that there was no existing plan to promote her to GS-12. According to

Dr. Geselbracht, he told her she was to focus on certain more substantive archival work. According to Briley, Dr. Geselbracht told her that she was to be removed from her position. The administrative judge, however, found that Briley retained an important role in the new declassification team, and that Briley refused to perform at least one duty assigned to her: training another employee to assist with declassification.

On May 27, 1994, Briley filed a grievance with Dr. Benedict Zobrist, the Library's director, asking to restore her previous duties and be converted to GS-12. Although she did not immediately claim that she had lost all of her duties, she later claimed that Dr. Geselbracht had taken away 98% of her duties. On June 7, Briley met with her union representative and Drs. Zobrist, Curtis, and Geselbracht to discuss her grievance. On June 13, in response to Briley's concerns about her duties being taken away, Dr. Geselbracht issued to Briley a memorandum outlining her duties under the new plan.

On July 14, 1994, in response to a request from Dr. Zobrist, Supervisory Position Management Specialist Jerry Pirtle, the chief of the agency's personnel classification program, issued an advisory opinion concluding that Briley's position was and remained properly graded as a GS-11, based on standards issued by the Office of Personnel Management. On August 5, 1994, Dr. Zobrist denied Briley's grievance. He informed Briley that her work did not warrant reclassification to GS-12 and that the restructuring was consistent with principles of good management, as well as Briley's grade.

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On September 6, 1994, Briley filed a request for corrective action with the Office of Special Counsel ("OSC"). She asserted, *inter alia*, that in retaliation for her making certain disclosures that Library management engaged in improper activities, the agency had downgraded her job responsibilities and refused to reclassify her position at the GS-12 level.

On January 6, 1995, following the OSC's failure to take timely action on her whistleblower claim, Briley filed an appeal with the Merit Systems Protection Board. On October 6, 1995, the administrative judge issued an Initial Decision. The administrative judge found that Briley had made protected disclosures; that Dr. Geselbracht and Dr. Curtis had knowledge of the disclosures; that the disclosures were a contributing factor in two personnel actions (the restructuring of Briley's duties and the agency's failure to promote her); and that the agency had failed to show by clear and convincing evidence that absent Briley's protected disclosures, Dr. Geselbracht and Dr. Curtis would have restructured Briley's duties and failed to promote Briley to GS-12. The administrative judge granted Briley's request for corrective action.

On December 1, 1995, after the agency petitioned the Board to review the administrative judge's decision, Briley filed an additional request for corrective action with the OSC. Briley's second OSC request was more comprehensive than her first. While Briley's first OSC letter reported only disclosures she made "commencing in April of 1994," Briley's second OSC letter reported disclosures from 1990 through 1993. Briley sought thereby to insulate herself from

the agency's charges that she had not properly exhausted her remedies before the OSC.

On July 19, 1996, the Board granted the agency's petition for review, vacated the administrative judge's initial decision, and remanded. First, the Board held that the administrative judge failed to make sufficient factual findings and analyze whether Briley's disclosures were protected. Second, the Board directed the administrative judge to further consider, in light of its opinion, whether Briley's change in duties or the agency's failure to promote her constituted a personnel action. Third, the Board noted that Briley's initial OSC complaint was limited to certain of Briley's 1994 disclosures and that the administrative judge had erred in not restricting his analysis to those disclosures. (The administrative judge's decision had been issued on October 6, 1995, prior to Briley's December 1, 1995, letter to OSC, which reported pre 1994 disclosures.) The Board also instructed the administrative judge to consider anew whether Briley had established that a protected disclosure was a contributing factor in any personnel actions and whether the agency showed by clear and convincing evidence that it would have taken the same personnel actions in the absence of any protected disclosures.

On remand, the case was assigned to a different administrative judge, who held a hearing on February 25-28, March 11-14, and May 15, 1997. On October 21, 1998, the administrative judge issued an Initial Decision and ruled in favor of the agency, dismissing Briley's appeal for lack of jurisdiction. The judge held that Briley had failed to exhaust her administrative remedies, that the agency did not take or fail to take a "personnel action," and that, in any

event, the agency had shown by clear and convincing evidence that it would have taken the same actions regarding Briley even absent her protected whistleblowing activities. On June 29, 1999, the Board denied Briley's petition for review, and Briley subsequently filed a timely appeal with this Court.

II

Large portions of the briefs in this case are directed to retrying factual issues decided against Ms. Briley by the Board, but that is not our function. Pursuant to 5 U.S.C. § 7703(c), we must uphold the Board's decision unless we find it to be: "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." *See Chase-Baker v. Dep't of Justice*, 198 F.3d 843, 845 (Fed. Cir. 1999). In addition, the Board's credibility determinations are "virtually unreviewable on appeal." *Rogers v. Dep't of Defense Dependents Sch.*, 814 F.2d 1549, 1554 (Fed. Cir. 1987).

III

Under 5 U.S.C. § 1214(a)(3), an employee is required to "seek corrective action from the Special Counsel before seeking corrective action from the Board." The Board's jurisdiction is limited to issues raised before the OSC. *See Ellison v. Merit Sys. Prot. Bd.*, 7 F.3d 1031, 1037 (Fed. Cir. 1993). An employee must "inform the Special Counsel of the precise ground of his charge of whistleblowing" and

"must 'give the Office of Special Counsel sufficient basis to pursue an investigation which might have led to corrective action.' " *Ward v. Merit Sys. Prot. Bd.*, 981 F.2d 521, 526 (Fed. Cir. 1992) (quoting *Knollenberg v. Merit Sys. Prot. Bd.*, 953 F.2d 623, 626 (Fed. Cir. 1992)). Briley bears the burden of showing that she sought corrective action from the OSC and that she exhausted her remedies there. *See Serrao v. Merit Sys. Prot. Bd.*, 95 F.3d 1569, 1574 (Fed. Cir. 1996).

In a footnote, the Board held that Briley had failed to demonstrate that she had requested corrective action from the OSC. *See* Initial Decision, *Briley v. Nat'l Archives and Records Admin.*, No. SL-1221-95-0183-B-1, at 151 n.151 (M.S.P.B. Oct. 21, 1998) ("Initial Decision"). The government urges that we affirm on this ground. We decline to do so, as we find that Briley complied with the requirement that she seek corrective action from the OSC.

On September 6, 1994, Briley filed with the OSC a complaint alleging that the agency downgraded her job responsibilities in retaliation for complaints she made "commencing in April of 1994" and refused to reclassify her as a GS-12. In addition, on December 1, 1995, Briley filed a second complaint with the OSC. This complaint stated that from 1990 to 1993, Briley had made allegations concerning security issues with the Library vault, Bilger's retention of his security clearance, and vault access by persons who lacked proper clearance. The Board found these disclosures overly vague and that Briley therefore had not properly exhausted her remedies before the OSC. However, the Board chose to address Briley's "new and more specific

complaints" directly because requiring Briley to exhaust her remedies would result only in further delay. Initial Decision at 151-52 n.151.

We disagree with the Board's analysis of Briley's allegations to the OSC. Briley in fact informed the OSC of the grounds for her charge of whistleblowing: that she had made allegations concerning both whether Bilger complied with security regulations and whether his security clearance should have been removed and also whether the Library vault complied with security-related rules and regulations. She alleged that the agency had retaliated against her by reassigning her duties and refusing to reclassify her as a GS-12. We recognize that in her hearing before the administrative judge, Briley gave a more detailed account of her whistleblowing activities than she did in her letters to the OSC. However, Briley's letters to the OSC nevertheless contain the core of Briley's retaliation claim. They gave the OSC sufficient basis to pursue an investigation, and they therefore satisfy Briley's obligation to seek corrective action and exhaust her remedies before the OSC.

The cases cited by the government do not support its contention that Briley failed to exhaust her remedies before the OSC. For example, in *Mintzmyer v. Dep't of the Interior*, 84 F.3d 419, 422 (Fed. Cir. 1996), the appellant alleged a set of retaliatory actions before the Board that she had not specified before the OSC. Here, in contrast, Briley informed the OSC of the basis for her retaliation claim; she then added further detail to her claim before the Board. In doing so, Briley complied with the requirement that she seek corrective action from the OSC.

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IV

To establish a prima facie case of retaliation for whistleblowing activity, an employee must show both that she engaged in whistleblowing activity by making a disclosure protected under 5 U.S.C. § 2302(b)(8) and that the protected disclosure was a contributing factor in a personnel action. *See* 5 U.S.C. §§ 1221(e)(1), 2302(b)(8). If a plaintiff establishes a prima facie case of retaliation for whistleblowing, corrective action must be ordered unless "the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure." 5 U.S.C. § 1221(e)(2); *Carr v. Social Sec. Admin.*, 185 F.3d 1318, 1322 (Fed. Cir. 1999).

A protected disclosure is a disclosure which an employee reasonably believes evidences "(i) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." 5 U.S.C. § 2302(b)(8). Before the Board, Briley asserted that she made 42 separate protected disclosures. The first 21 disclosures dealt with issues regarding Bilger; the last 21 disclosures dealt with vault security. The Board found, and the government does not dispute, that the appellant engaged in at least two instances of whistleblowing activity. First, on May 2, 1990, Briley disclosed to Dr. Geselbracht that Bilger left collections containing classified materials in open areas of the Library, a disclosure which Briley reasonably believed concerned a non-trivial violation of the Department of Defense Information Security Program. Second, on or before May 9, 1990, Briley disclosed to Dr. Geselbracht, Dr. Curtis, and

others that contract security guards could disable the Library vault's alarm, a disclosure which Briley reasonably believed violated a standard of the CIA's Manual of Physical Security Standards for Sensitive Compartmented Information Facilities.

The Board found that Briley's other 40 disclosures did not qualify as protected disclosures under 5 U.S.C. § 2302(b)(8). After reviewing the record, we have some concern that the Board improperly rejected disclosures which should qualify as protected under 5 U.S.C. § 2302(b)(8). For example, citing *Dep't of the Navy v. Egan*, 484 U.S. 518 (1988), the Board held that it lacked jurisdiction to review Briley's claims regarding Bilger's security clearance approval. *See* Initial Decision at 83-84, 107. In *Egan*, the Supreme Court held that the Board does not have authority to review the substantive merits of the agency's decision to deny security clearance to the employee. *See Egan*, 484 U.S. at 526-30. This court has subsequently held that the Board lacks jurisdiction to review an employee's claim that his or her security clearance was suspended in retaliation for whistleblowing. *See Hesse v. Dep't of State*, 217 F.3d 1372, 1375-80 (Fed. Cir. 2000).

The situations in *Egan* and *Hesse*, however, are substantially different from this case: Briley claims that she was retaliated against because she raised questions about the appropriateness of Bilger's access to classified information. To redress Briley's claim, the Board would not necessarily be required to trespass on territory forbidden to it by *Egan*: it would have no need to overrule the agency's determination of whether Bilger should or should not have access to classified information. The protection of classified

information would remain "committed to the broad discretion of the agency responsible." *Egan*, 484 U.S. at 529. Instead, the Board would only be required to determine whether Briley made a disclosure which she reasonably believed violated a law, rule, or regulation related to security classifications. Nor does this case involve a question whether Briley's own security clearance was suspended in retaliation for whistleblowing, as in *Hesse*.

Nevertheless, we need not resolve this question here. The Board properly determined that two of Briley's disclosures were protected, and Briley therefore has met her burden of showing that she engaged in whistleblowing activity. It is true, of course, that if we relied only on those two protected disclosures, the four-year gap between the disclosures and the alleged personnel actions would present serious questions about whether the disclosures caused the alleged personnel actions. However, because we ultimately uphold the Board's determinations that Briley's change in duties did not constitute a personnel action and that even in the absence of Briley's disclosures, the agency would have failed to reclassify Briley as GS-12 or to create and promote her to a new GS-12 position, *see infra* at parts V and VI, the agency will not be required to take corrective action in this case, and we need not address this causation question.

V

The Board also found that Briley failed to show that the agency took or failed to take a personnel action (as defined in 5 U.S.C. § 2302(a)(2)(A)) with respect to Briley. Briley alleges that the Board subjected her to three personnel actions

in retaliation for her protected disclosures: a reduction in her duties, a failure to reclassify her position as a GS-12, and a failure to promote her to GS-12. We conclude that substantial evidence supports the Board's determination that the change in Briley's duties which accompanied the restructuring did not constitute a personnel action. While the assertions that the agency's failure to reclassify or promote Briley constituted personnel actions are "non-frivolous" allegations sufficient to confer jurisdiction on the Board, *see Schmittling v. Dep't of the Army*, 219 F.3d 1332, 1336 (Fed. Cir. 2000), we do not need to decide the ultimate merits of those claims. Instead, we uphold the Board's determination that the agency has shown by clear and convincing evidence that it would have taken those actions in the absence of Briley's disclosures.

We begin with Briley's claim that the change in her duties under the Library's restructuring constituted a personnel action. At the time the agency changed Briley's declassification duties, the definition of "personnel action" included "any other significant change in duties or responsibilities which is inconsistent with the employee's salary or grade level . . . ." 5 U.S.C. § 2302(a)(2)(A)(x)(1988). Effective October 29, 1994, Congress amended this provision by deleting the words "inconsistent with the employee's salary or grade level." 5 U.S.C. § 2302(a)(2)(A)(xi)(1994). In analyzing Briley's claims, the Board correctly applied the pre 1994 standard. This court has previously held that the 1994 amendment should not be applied retroactively to conduct that occurred before the amendment's enactment. *See Caddell v. Dep't of Justice*, 96 F.3d 1367, 1370-71 (Fed. Cir. 1996) (analyzing the 1994 amendment under *Landgraf*

v. USI Film Prods., 511 U.S. 244 (1994)). Thus, the Board's decision to apply the pre 1994 amendment standard was clearly correct.

Briley points to a document, which she characterizes as a stipulation with the agency, which she asserts demonstrates that most of her duties were removed by Dr. Geselbracht on March 28, 1994. Briley overstates the extent of the agency's concessions. The agency disagreed with many of Briley's claims regarding her duties, and it certainly never stipulated that virtually all of her duties were taken from her. Of course, the Library does indeed agree that many of Briley's duties were taken from her, and the Board did not find otherwise. These duties ranged from "attempt[ing] to declassify documents before they are submitted to agencies" to "changing the combinations of the safes inside the vault." Briley and the Library disagree on other questions involving her change in duties, such as whether Dr. Geselbracht told Briley not to do any declassification work at all. However, it is not necessary for us to decide exactly which duties were taken from Briley, as our focus is instead on whether Briley's post-restructuring duties were consistent with her grade level.

The Board held that Briley's post-restructuring duties were consistent with her grade level, and thus that her change in duties was not a personnel action within the meaning of the statute. This determination is supported by substantial evidence. Even after restructuring, according to the Library, Briley retained the most substantive duties of the declassification team: she remained the only person at the Library in charge of systematic review, which requires an archivist to review documents and declassify them herself,

based on guidelines provided by the document's agency of origin. The Board also found that Briley had *refused* to perform at least one significant duty she was assigned after restructuring: training another employee to conduct "outgoing mandatory review." The Board noted that after restructuring, Briley was given mainly reference assignments, as well as the more demanding components of declassification. The Board found that "reference assignments provide the bulk of a GS-11 Archivist work." Initial Decision at 143. Thus, it held that Briley's post-restructuring duties, "although disdained by the appellant, are entirely consistent with her GS-11 Archivist grade." *Id.* Finally, because Briley's change in duties did not constitute a personnel action, the agency's refusal to restore her duties did not constitute a personnel action either.

Briley contends that two other actions which the agency failed to take constitute personnel actions: the agency failed to reclassify Briley's grade from GS-11 to GS-12, and the agency refused to create a new GS-12 Nonsupervisory Archivist position and promote her to it. The Board rejected both of these contentions. On the first, the Board held that Briley had not shown she was entitled to reclassification. On the second, the Board determined that Briley had not "presented any evidence to show the Truman Library's decision not to fund a GS-12 Nonsupervisory position was improper." Initial Decision at 151. Although the Board's decision may be supported by substantial evidence, these questions are not without difficulties, such as whether the agency's discretionary decision not to create a new position can constitute a personnel action. Furthermore, as we discuss in the next section, we agree with the Board that there is clear and convincing evidence that even in the absence of Briley's disclosures, the agency would not

have reclassified her position or created a new GS-12 position for her. Therefore, we will assume without deciding that both the agency's failure to reclassify Briley's grade from GS-11 to GS-12 and the agency's refusal to create and promote Briley to a new GS-12 Nonsupervisory Archivist position constituted personnel actions.

VI

Even assuming that Briley succeeded in establishing her prima facie case, the agency is not required to order corrective action if it demonstrated "by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure." 5 U.S.C. § 1221(e)(2); *Carr v. Social Sec. Admin.*, 185 F.3d 1318, 1322 (Fed. Cir. 1999). The Board found that the agency would have taken the same personnel actions in the absence of Briley's disclosures. *See* Initial Decision at 151-55. Here, we will review the Board's findings regarding the two personnel actions we have identified: the agency's failure to reclassify Briley as GS-12 and its failure to create and promote her to a new GS-12 position.

The Board found that the agency had shown by clear and convincing evidence that it would not have reclassified Briley's position as a GS-12 position absent her disclosures. The Board cited the testimony of Supervisory Position Management Specialist Pirtle, who stated that he was the final arbiter of Briley's reclassification request. Pirtle audited Briley's position (based on her duties before the Library's restructuring) and found that it was properly classified as GS-11. Pirtle noted that much of Briley's work was appropriate

for lower-graded Archives Technicians, which could have diluted Briley's grade below GS-11.

Although Briley considered her work similar to that performed by GS-12's at other Presidential Libraries, the Board noted that "[t]here is no evidence in the record to support [Briley's] claim that the scope of Truman Library's classified holdings generated work as complex as that performed" at other libraries. Initial Decision at 154. The Board also noted that Briley had not been given the team-leader or acting supervisory duties of those at other libraries with GS-12 classifications. In addition, the Board correctly noted that under federal regulations, classifications are performed by comparing an individual's duties with the relevant classification standards, not by comparing an individual's duties with the duties performed by other employees. *See* 5 C.F.R. §§ 511.601-511.616. Such comparisons would perpetuate existing misclassifications. Here, substantial evidence supports the Board's determination that the agency had shown by clear and convincing evidence that it would not have reclassified Briley's position as a GS-12 position, even absent her disclosures.

Second, the Board found that the agency had shown by clear and convincing evidence that it would not have created a GS-12 Senior Nonsupervisory Archivist position and promoted Briley to it absent her protected disclosures. The Board noted that the record demonstrated that if Library management were to create a GS-12 position, that position would likely not be in declassification. As Dr. Geselbracht told Briley, the Library's declassification program was old

and small, and he had previously told her that he hoped to reduce it to a half-time position. Given the small (and decreasing) size of the Library's declassification program, we find that substantial evidence supports the Board's determination that even absent Briley's protected disclosures, the Library would not have created a GS-12 position in declassification.

VII

We note that the prolonged history of this case calls into question the Board's ability to provide prompt justice to both the complaining employee and to the government agency. Briley filed her first appeal with the Merit Systems Protection Board in January of 1995, and the Board's final order was not issued until June of 1999 a period of four and a half years. The costs of such extensive and time-consuming litigation weigh heavily on the complaining employee and the civil service generally. In the future we expect that the Board, the government, and complaining employees will take appropriate steps to avoid such protracted proceedings.

For the foregoing reasons, the Board's decision in this case is affirmed.

COSTS

No costs.

Appendix

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

99-3413

CAROL BRILEY,

Petitioner,

v.

NATIONAL ARCHIVES & RECORDS ADMINISTRATION,

Respondent.

JUDGMENT

Petition for review of the Merit Systems Protection Board in SL1221950183-B-1.

This CAUSE having been heard and considered, it is

ORDERED AND ADJUDGED: **AFFIRMED**

ENTERED BY THE ORDER
OF THE COURT

DATED: January 22, 2001 s/ Jan Horbaly
Jan Horbaly, Clerk

ISSUED AS A MANDATE: March 15, 2001